INDEX

CITATIONS

Cases:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE GREYHOUND CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Regional Director of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on November 21, 1962.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Appendix A, *infra*, p. 13) is reported at 309 F. 2d 397. The decision of the district court (Appendix A, *infra*, pp. 14–24; R. 60–69)[1] is reported at

[1] "R." refers to the printed record and proceedings in the court of appeals which have been certified by the clerk of that court and lodged with this Court. The Regional Director's motion to dismiss the complaint (cited herein as "R.D. Mo-

205 F. Supp. 686. The Board's Decision and Direction of Election (R. 10–13) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1962 (Appendix A, *infra*, pp. 24–25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district court has jurisdiction, in an independent action brought by an employer, to enjoin a representation election directed by the National Labor Relations Board pursuant to Section 9 of the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra*, pp. 26–29.

STATEMENT

A. THE REPRESENTATION PROCEEDING

In April 1961, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL–CIO ("the Union") filed a petition pursuant to Section 9 of the National Labor Relations Act with the Board, requesting that a representation

---

tion"), with attached exhibits, was inadvertently omitted from the printed record in the court of appeals. (It was before that court as an appendix to the Regional Director's brief.) Copies of this document have been certified by the Clerk of the District Court for the Southern District of Florida, Tampa Division, and lodged with the Court.

election be conducted among the porters, janitors and maids employed at the bus terminals operated by the Greyhound Corporation in Miami, St. Petersburg, Tampa, and Jacksonville, Florida. These employees were on the payroll of Floors, Inc., of Florida ("Floors"), which had contracts with Greyhound to provide certain services at the four bus terminals. The petition asserted that Greyhound was in fact the employer of the employees or at least their joint employer with Floors (R. 11).

Thereafter, a hearing was held on this petition in which Greyhound, Floors and the Union participated. At the hearing, Greyhound and Floors contended that Floors was the sole employer of the porters, maids and janitors. In addition, Floors contended that the unit sought by the Union was inappropriate. On May 3, 1962, the Board issued its Decision and Direction of Election in which it found, *inter alia*, that Greyhound and Floors were the joint employer of the employees in question and that a unit composed of all the employees under the joint employer relationship was an appropriate unit in which to conduct an election.[2] Accordingly, the Board directed that an

[2] The Board found that, although "Floors hires, pays, disciplines, transfers, promotes and discharges" the employees involved, "Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules," Floors' supervisors visited "the Greyhound terminals on an irregular basis," the employees received work instructions from Greyhound officials, and, on one occasion, Greyhound obtained the discharge of an unsatisfactory porter. Member Rodgers dissented from the joint employer finding (R. 11–12, n. 3).

election be held among those employees (R. 10–13). On May 11, 1962, Floors filed a motion for reconsideration, which was denied (Exh. C, attached to R.D. Motion).

B. THE INSTANT SUIT

On May 24, 1962, Greyhound filed suit in the United States District Court, Southern District of Florida, Tampa Division, to have the Board's Decision and Direction of Election reviewed and set aside (R. 1–44). The complaint alleged that the Board's action violated certain provisions of the National Labor Relations Act and the Fifth Amendment to the Constitution and that the court had jurisdiction under 28 U.S.C. 1337 (R. 2–5). The same day, upon Greyhound's *ex parte* application, the district court issued a temporary restraining order against the holding of the election (R. 52–54). The Regional Director then moved to dismiss the complaint, or in the alternative for summary judgment, on the grounds that: (1) the district court lacked jurisdiction over the subject matter of the action; (2) the district court lacked jurisdiction over the members of the Board who were indispensable parties to the action; (3) the action was premature; and (4) the complaint failed to state a claim warranting judicial relief (R.D. Motion).

On June 11, 1962, after hearing, the district court issued a permanent injunction enjoining the Regional Director from proceeding further in the representation case and denied the Director's motion to dismiss the complaint or in the alternative for summary judgment (App. A, *infra*, pp. 14–24). The court found that the factors relied upon by the Board were "as a

matter of law insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining purposes, its employees are not the employees of [Greyhound]" (App. A, *infra*, pp. 15–16). Concluding that Section 9 of the Act "contemplates representation proceedings only as regards the employer of the employees comprising the unit found appropriate by the Board," the court held that the Board had exceeded its statutory authority in directing an election in a unit composed of employees at the Greyhound terminals (*ibid.*). The court further held that it had jurisdiction of the suit under *Leedom* v. *Kyne*, 358 U.S. 184, rejecting the contention that that decision had no application to an employer, like Greyhound, who could obtain review of the election in the court of appeals under Section 10 (e) and (f) of the Act in connection with review of any unfair labor practice order that the Board might subsequently issue (App. A, *infra*, pp. 17, 18–20).

The Court of Appeals for the Fifth Circuit affirmed on the opinion of the district court (App. A, *infra*, p. 13).

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals misconceives the scope of this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184; it is contrary to the decisions of the Court of Appeals for the District of Columbia Circuit; and it raises a question of great importance to the future administration of the Act.

676095—63——2

1. In *Leedom* v. *Kyne*, 358 U.S. 184, this Court held that the federal district court had jurisdiction, under its general equity powers, of a suit brought by a labor organization to review and set aside a certification issued after an election under Section 9 of the Act. The Board had certified the labor organization as the exclusive representative of a unit consisting of professional and non-professional employees, and the labor organization contended that the Board's action contravened Section 9(b)(1) of the Act in that non-professionals were put in the unit without first affording the professionals the opportunity to vote on whether the non-professionals should be included. The Court, in sustaining the district court's exercise of jurisdiction, emphasized (1) that the Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act" (*id.* at 188); and (2) that "'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means within their control * * * to protect and enforce that right" (*id.* at 190).[3]

[3] A labor organization which is aggrieved by a Board representation determination is usually not in a position to utilize the statutory review procedure at all, for having been denied a certification it could not complain about an employer's refusal to bargain with it. It has been suggested, however, that the labor organization in *Kyne*, having obtained a certification (though not in the unit it desired), was in a position where, theoretically at least, it could refuse to bargain with the employer for the non-professionals in the union and thereby obtain judicial review under Section 10 of the Act. See 73 Harv. L. Rev. 84,

The situation here is entirely different and, as we read the opinion, nothing in *Leedom* v. *Kyne* permits an employer to circumvent the statutory procedure for review of representation proceedings under Section 10 by resorting to an independent equity suit in the district court to review a Direction of Election. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Even if it be assumed that the Board exceeded its statutory authority (as the district court found, but we deny), there exists an adequate procedure under

---

219–220 (1959); *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222, 229 (C.A. 2). Whatever the merits of this suggestion, the means of securing statutory review available to the labor organization were much less dependable than an employer's refusal to bargain. This was recognized by the court of appeals in *Kyne* which pointed out (249 F. 2d 490, 492):

> Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy * * *. Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

It seems clear from its opinion that this Court accepted the position of the court of appeals and decided *Kyne* on the basis that the equity suit was the sole realistic means open to the labor organization to test the legality of the Board's action (358 U.S. at 190).

The district court's conclusion (App. A, *infra*, pp. 15–17) appears to rest on the premise that Floors is an independ-

the Act—which was lacking in *Kyne*—whereby Greyhound could have its contentions reviewed in the court of appeals. If the Union won the election and were certified, Greyhound could refuse to bargain with it on the ground that the certification was invalid. Were the Board then to find that the refusal constituted an unfair labor practice and to issue an order compelling Greyhound to bargain based on the certification, Greyhound could obtain review of that order and the underlying certification in the court of appeals under Sections 9(d) and 10 (e) or (f) of the Act (App. B., *infra*, pp. 27–29). Until such review had been obtained in the court of appeals, Greyhound would not be required to take any action based on the Board representation decision, nor would it incur any legal

---

ent contractor vis-a-vis Greyhound and that thus it follows that Greyhound cannot be an "employer" of the Floors employees working at the Greyhound terminals. Assuming *arguendo* that Floors is sufficiently independent of Greyhound so that it would not be regarded as an "employee" or a mere department of Greyhound, it does not follow that Floors could not, with respect to the workers whom it hires, share control over their working conditions with Greyhound to such an extent as to make the latter a co-employer of those workers. The test of whether a person is an "employer" of particular employees, within the meaning of Section 2(2) of the Act, is whether he possesses power to control their terms and conditions of employment. See *West Texas Utilities Co.*, 108 NLRB 407, 413–414, enforced, 218 F. 2d 824 (C.A. 5); *Panther Coal Co., Inc.*, 128 NLRB 400. Cf. *Operating Engineers Local Union No. 3 v. National Labor Relations Board*, 266 F. 2d 905, 909 (C.A. D.C.), certiorari denied, 361 U.S. 834. The issue of control, turning as it does on the facts of each case, is best determined on a full administrative record. This record was not before the district court in the summary judgment proceedings below but would have been before the court of appeals had Greyhound followed the statutory review procedure detailed above.

injury. Since the statutory review procedure was available and adequate, *Kyne* afforded no basis for intervention by the district court.

Further, *Kyne* involved a suit to review a Board certification (the final step in a representation proceeding), whereas here Greyhound seeks review at the election stage. Since, if the Union were to lose the election, no certification would issue, it has been held that the holding of an election does not result in irreparable injury warranting the grant of equitable relief. *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 442 (C.A. 4); *Local Union 492* v. *Schauffler*, 162 F. Supp. 121, 124 (E.D. Pa.); *Klein* v. *Herrick*, 41 F. Supp. 417, 423–424 (S.D. N.Y.) Nothing in *Kyne* suggests that, even in a situation where the statutory review procedure is inadequate and the district court could thus be resorted to for review of a certification, the courts would have power to enjoin a Board election. See Cox, *The Major Labor Decisions of the Supreme Court, October Term 1958*, reprinted in Gellhorn and Byse, *Administrative Law: Cases and Comments* (1960), 441, 447–448.

The legislative history of the Wagner and Taft-Hartley Acts shows that Congress deliberately confined the employer's opportunity to obtain review of representation proceedings to the procedure specified in Section 9(d) (App. B, *infra*, p. 27), *i.e.*, to cases in which a certification forms the basis for an unfair labor practice order and that order is before the court of appeals for review or enforcement under Section 10 (e) or (f) of the Act (App. B, *infra*, pp. 27–29).

Congress carefully considered proposals which would have permitted direct review of representation determinations and rejected them because review at the representation stage would afford too great an opportunity for dilatory tactics, thus frustrating the statute's basic policy of promoting collective bargaining.[5]

2. The holding of the Fifth Circuit, that *Kyne* permits an employer who has an adequate statutory remedy to obtain review in the district court of an allegedly erroneous Board representation determination, is in direct conflict with the decisions of the Court of Appeals for the District of Columbia Circuit. *General Cable Corp.* v. *Leedom*, 278 F. 2d 237, 239 (C.A. D.C.); *Atlas Life Insurance Co.* v. *Leedom*, 284 F. 2d 231 (C.A. D.C.); see also, *Norris* v. *National Labor Relations Board*, 177 F. 2d 26 (C.A. D.C.).[6] Other courts have given *Kyne* the interpretation

---

[5] The legislative history is summarized in the dissenting opinion of Mr. Justice Brennan in *Kyne*, 358 U.S. 184, 191–194. Greyhound's argument, accepted by the district court below (App. A, *infra*, pp. 19–20), that the threat of injury due to picketing affords a basis for judicial intervention before issuance of a final unfair labor practice order, was made in support of legislation proposed in 1938 and again in 1947, which would have established such a remedy. In both cases, the proposals were rejected as contrary to the primary purpose of the Wagner and Taft-Hartley Acts, respectively. See *ibid.*, *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 443–444 (C.A. 4); H. Rep. 245, 80th Cong., 1st Sess., p. 43; 93 Cong. Rec. 6444.

[6] The Sixth Circuit has reflected the same view in denying a stay pending appeal in a case similar to the instant one. *Eastern Greyhound Lines* v. *Fusco*, 51 LRRM 2278 (N.D. Ohio), September 12, 1962, stay pending appeal denial, 51 LRRM 2661 (C.A. 6), December 4, 1962. See also, *Suprenant Mfg. Co.* v. *Alpert* (D. Mass.) Jan. 31, 1963, Wyzanski, J.

adopted by the court below, holding that a district court suit may be maintained by any party—either an employer or a labor organization—who presents a substantial claim that the Board, in a representation proceeding, has exceeded its statutory authority.[7] See *Boyles* v. *Waers*, 291 F. 2d 791 (C.A. 10); *Consolidated Edison Co.* v. *McLeod*, 302 F. 2d 354 (C.A. 2); *U.S. Pillow Corp.* v. *McLeod*, 208 F. Supp. 337 (S.D. N.Y.);[8] cf. *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222, 227–229 (C.A. 2), pending on writ of certiorari, Nos. 91 and 93, this Term. See also, *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4).

Review by this Court is necessary to resolve this conflict and confusion among the circuits over the scope of *Kyne*. If the decision below were to stand, it would provide added impetus for employer suits to review Board orders in representation proceedings; the number of such suits has already sharply increased since the decision in *Leedom* v. *Kyne*.[9]

---

[7] Prior to *Kyne*, the Fifth Circuit had held that the employer was confined to the statutory review procedure. *Volney Felt Mills* v. *Le Bus*, 196 F. 2d 497 (C.A. 5).

[8] In each of these three cases, *Boyles*, *Consolidated Edison* and *U.S. Pillow*, the court rejected the employer's contention on the merits. There was, therefore, no occasion for the Board to seek review by this Court of the jurisdictional issue presented here.

[9] In the four-year period since this Court's decision in *Kyne*, there have been 29 such suits, as compared with 7 in a comparable period preceding that decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JAMES C. PARAS,
HERMAN M. LEVY,
Attorneys,
National Labor Relations Board.

FEBRUARY 1963.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19755

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, APPELLANT

versus

THE GREYHOUND CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AT TAMPA

(November 21, 1962)

Before JONES and BELL, *Circuit Judges*, and CARSWELL, *District Judge*.

PER CURIAM: The questions in this important case were carefully considered by the district court and discussed by the judge to whom the case was assigned. *Greyhound Corporation* v. *Boire*, 205 F. Supp. 686. We find ourselves in agreement with the principles there stated and the decision there reached. The judgment of the district court is

Affirmed.

67-0065—63—3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

TAMPA DIVISION

No. 4414 Civ. T.

THE GREYHOUND CORPORATION, A DELAWARE CORPORATION, PLAINTIFF

vs.

HAROLD A. BOIRE, AS REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, DEFENDANT

FINAL DECREE FOR PERMANENT INJUNCTION AND MEMORANDUM OPINION

LIEB, *District Judge*

THIS CAUSE came on to be heard upon the plaintiff's Prayer for Preliminary Injunction, said hearing having been provided in the Court's Temporary Restraining Order and Order Setting Hearing for Preliminary Injunction entered May 24, 1962. Prior to the hearing, the defendant filed a Motion to Dismiss and, in the alternative, a Motion for Summary Judgment. Plaintiff presented its Complaint and exhibits attached thereto, together with an affidavit of an officer of Floors, Inc., of Florida, and an affidavit of the regional manager of plaintiff, the latter affidavit, in part, swearing to the allegations of the Complaint. No affidavits were presented on behalf of the defendant nor were any sworn pleadings filed on behalf of said defendant.

After considering the matters hereinabove referred to and hearing argument of counsel for the respective parties, the Court is of the opinion that there are

no material issues of fact, and the issues of law as resolved herein make it unnecessary and undesirable for the Court to issue a temporary injunction but that a permanent injunction is warranted by the findings hereinafter set forth.

The plaintiff contends that a Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12–RC–1209, issuing certain directions to the defendant herein, is contrary to the express provisions of the National Labor Relations Act, as amended, and is beyond the statutory powers vested in the National Labor Relations Board. This contention is predicated upon the fact that in said Decision and Direction of Election, the Board found that a corporate entity other than plaintiff, *viz.*, Floors, Inc., of Florida, hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids who are alleged to constitute an appropriate unit for the purposes of collective bargaining; but nevertheless also found that the said Floors, Inc., and the plaintiff, were joint employers of the employees in the said unit. The findings of the Board, allegedly in support of a joint employer relationship, are that the plaintiff's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules; that Floors' supervisors may visit the plaintiff's terminals on an irregular basis, and on occasion may not appear for as much as two days at a time; that the employees receive work instructions from plaintiff's terminal officials; and that on one occasion the plaintiff prompted the discharge of a porter whom it felt to be an unsatisfactory employee. The Court is of the opinion that the findings of the Board, as recited, are, as a matter of

law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff. The Court is therefore of the opinion and finds that with regard to representation proceedings the Board is prohibited by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees. The Court finds that Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board. The Court further finds that by virtue of Section 2(3) of the Act, any individual having the status of an independent contractor is expressly excluded from the term "employee", as defined in that Act. As a matter of law, the employees of an independent contractor do not stand in the relationship of employer-employee with regard to the principal who employs the independent contractor for the purpose of Section 9 of the Act, unless the facts involve an alter ego situation, that is where one employer is in fact the alter ego of another employer, which is clearly not the case in this instance. To follow a contrary interpretation of the Act would be patently absurd. One can readily see that the prime object of the compulsory bargaining feature of the Act is to bargain on wages and working conditions. It is impossible to comprehend how an employer could bargain in good faith about wages with employees who are not paid by said employer

and over whom the said employer cannot exercise the power of hiring or firing.

The Court further finds that this case is controlled by the decision of the Supreme Court of the United States in *Leedom* v. *Kyne* (1958), 358 U.S. 184, 3 L. Ed. 2d 210, 79 Sup. Ct. 180, and that this Court has jurisdiction of the action under Section 24(8) of the Judicial Code, 28 U.S.C.A., § 1337, because the action arises under an Act of Congress regulating commerce. The Court further finds that in its said Decision and Direction of Election the Board has attempted to act in excess of its delegated power, particularly in view of the legislative history of the portion of the Taft-Hartley Act of 1947 which amended the definition of the word "employee" so as to expressly exclude "independent contractors".

In further support of the Court's finding that there is no employer-employee relationship, as between the persons described in the unit and the plaintiff, are affidavits which are not challenged by counter-affidavits in this case, demonstrating conclusively that, with respect to the said employees, Floors, Inc., and only Floors, Inc., pays social security taxes and unemployment compensation insurance, withholds Federal income taxes, determines rates of pay and hours of employment, provides day to day supervision, furnishes all supplies and equipment used by its employees, and retains and exercises the right to use its employees on whatever job it desires; and that the employees in the purported unit constitute only a relative few of Floors' employees in the areas involved, such other employees being engaged in activities wholly unrelated to the plaintiff.

The defendant's contention is that this Court is without jurisdiction of the subject matter, first, be-

cause the subject matter is exclusively within the competence and jurisdiction of the Board by virtue of the National Labor Relations Act, and as amended by the Taft-Hartley Act, and second, even if this Court is not deprived of jurisdiction because of the Acts cited above, it lacks equity jurisdiction because of the availability of other adequate remedies which exist before the Board and before the Court of Appeals through the enforcement proceedings provided for in the Act.

With regard to the first contention, it is the opinion of the Court that the subject matter involved in this litigation is not the subject matter which is within the exclusive jurisdiction and competence of the Board, and the matter involved in this cause does not involve a review of an erroneous decision of the Board but rather involves an attack on the action taken by the Board which it was not authorized to take under the statute. Representation orders of the Board have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938). (See *Empresa Hondurena de Vapores, S.A.*, v. *Ivan C. McLeod*, Regional Director, etc. (2 Cir. 1962), 300 F. 2d 222.) Whether or not this Court is authorized to intervene in a representation proceeding depends ultimately on the facts presented to it; and if it appears that the Board exceeded its delegated powers, either by acting contrary to a mandatory prohibition of the Act (see *Leedom* v. *Kyne, supra*) or by acting clearly contrary to the over-all spirit of the Act and the manifested intention of Congress (see *Empresa Hondurena de Vapores* v. *McLeod, supra*), then this Court cannot fail to exercise its equity powers to prevent a wrong.

With regard to the second contention that this Court lacks equity jurisdiction because of the availability of other remedies, it is the opinion of the Court that this contention is equally without merit. The method allegedly open to the plaintiff to contest the Board's decision is as follows: The plaintiff can refuse to bargain with the Union involved in this case when it is certified, and thereby plaintiff is open to an unfair labor practice charge. (29 U.S.C. § 158(a)(5).) As an incident to the hearing of such charge by the Board, and upon review by a United States Court of Appeals, the certification of the Union can be inquired into. (29 U.S.C. § 159(d), 160.) The defendant further contends in this respect that even under *Leedom* v. *Kyne, supra,* it is only the Union that is entitled to invoke the equity jurisdiction of Federal District Courts.

The defendant's contention that the alleged availability of this method of review bars the plaintiff from seeking relief from this Court does not bear close analysis. First, it presupposes that, upon the plaintiff's refusal to bargain in good faith, the Union will file an unfair labor charge. Second, it presupposes that, upon the filing of such an unfair labor charge by the Union, the Board will institute an enforcement proceeding. These presuppositions are patently without foundation. The likelihood that the Union will resort to the use of the powerful weapon of picketing, and thereby tie up with a handful of pickets the entire transportation system of the plaintiff, is far greater and more real than the likelihood that the Union will resort to filing an unfair labor charge with the Board.

Assuming, but not admitting, that the Union will file an unfair labor charge upon the plaintiff's refusal to bargain, the determination of the unfair labor

charge by the Board, and the enforcement proceeding, are known to be prolonged and very time-consuming; and picketing of the plaintiff by the Union while the case is being decided by the Court of Appeals could mean complete economic ruin to the plaintiff. Even if the plaintiff would ultimately prevail, its victory would, indeed, be a pyrrhic one. In the light of the foregoing, one is compelled to conclude that the said method of review, allegedly available to the plaintiff, is not an adequate remedy.

With regard to the contention that under *Leedom* v. *Kyne, supra,* only the Union can invoke the equity jurisdiction of the District Court, it is the opinion of the Court that nothing in the *Leedom* case indicates the proposition urged here by the defendant. This contention was rejected by the Court in *Worthington Pump and Machinery Corporation* v. *Douds, et al,* (1951, D.C. N.Y.), 97 F. Supp. 656, and this Court is in full agreement with the principles expressed in said case.

The defendant also contends that the Court lacks jurisdiction of the members of the National Labor Relations Board who are indispensable parties to this action. This contention is likewise without merit because the relief sought may be effectively granted against the defendant Regional Director (see *Empresa Hondurena de Vapores* v. *McLeod, supra; Williams* v. *Fanning* (1947), 332 U.S. 490, 92 L. Ed. 95; and *Brgdley Lumber Co., etc., et al.* v. *National Labor Relations Board* (5 Cir. 1936), 84 F. 2d 97).

The defendant also contends that the action is premature. This is merely another way of saying that the plaintiff must exhaust administrative remedies provided with regard to unfair labor practice cases, as set forth in the National Labor Relations Act, as amended. This contention is likewise without merit

for the same reasons assigned hereinabove with regard to the contention that the Court is without jurisdiction of the subject matter of this action.

Finally, the defendant contends that the Complaint fails to state a claim warranting relief. The Court finds this contention likewise to be without merit for the same reasons hereinabove assigned with regard to the contention that the Court is without jurisdiction of the subject matter and the contention that the action is premature.

For the reasons hereinabove assigned, the defendant's Motion to Dismiss will be denied.

Defendant moves, in the alternative, that a Summary Judgment be entered in his favor on the basis of the Complaint, and exhibits attached thereto, and the Motion, and exhibits attached thereto. The exhibits attached to the Complaint consist of the Decision and Direction of Election, which is the subject matter of the Complaint, together with letters from the assistant to the Regional Director, defendant herein, advising plaintiff of the immediacy of the proposed election, copies of agreements between the plaintiff and Floors, Inc., with respect to the services involved herein, and a certified copy of an Order of the United States District Court of the Southern District of Florida, Jacksonville Division, in an action between plaintiff and the petitioning Union in the instant case, wherein the Honorable Bryan Simpson, United States District Judge, found the contract between the plaintiff and Floors, Inc., to constitute an independent contractor relationship.

The exhibits to the Motion of the defendant are comprised of a Petition to the National Labor Relations Board, dated April 17, 1961, wherein the employees in the unit proposed by the National Labor Relations Board in this case petition for a representa-

tion election with regard to their employer, Floors, Inc.; an Amended Petition dated May 25, 1961, naming Southeastern Greyhound Lines and Floors, Inc., as the "employers"; a copy of the Decision and Direction of Election, which is also attached as an exhibit to the Complaint; a copy of an Order dated May 25, 1962, denying a Motion for Reconsideration in case No. 12–RC–1209, filed by Floors, Inc.; and a Memorandum in Support of Defendant's Motion to Dismiss the Complaint and for Summary Judgment. The Memorandum in Support of the Motions will not be construed as evidence in the case but merely as a legal memorandum or brief of the defendant.

The plaintiff filed with the Court, and served upon the defendant, an affidavit of the secretary of Floors, Inc., of Florida, setting forth in detail all of the elements which constitute Floors, Inc., as the sole employer of the employees in the proposed unit. The plaintiff also filed and served upon the defendant the affidavit of J. W. Cable, Regional Manager of the plaintiff for the territory covering the State of Florida, identifying under oath the various attachments to the Complaint, swearing to the allegations of the Complaint, and setting forth in substantial detail the relationship between the plaintiff and Floors, Inc., demonstrating a pure independent contractor relationship.

Inasmuch as the Motion for Summary Judgment of the defendant raises no issue of fact, and inasmuch as said Motion for Summary Judgment does not refute the allegations of the Complaint or of the affidavits in support thereof, but relies upon the same contention of law hereinabove referred to with regard to the Motion to Dismiss, and said contentions being found by the Court to be without merit, the said

Motion for Summary Judgment will likewise be denied.

The Court finds that the plaintiff has a statutory right not to be held to be an employer jointly and together with an independent contractor with respect to the employees of said independent contractor in a representation proceeding under the Act, and that the violation of the Act on the part of the National Labor Relations Board and the deprivation of said right of the plaintiff will cause the plaintiff to suffer irreparable injury unless the injunction prayed for be granted. The Court finds that the plaintiff has no adequate remedy at law. It is, therefore, upon consideration,

ORDERED, ADJUDGED and DECREED:

1. That the defendant, Harold A. Boire, as Regional Director of the Twelfth Region, National Labor Relations Board, his successors or designees, and all persons acting in his stead or under his direction or control, be, and they are hereby, permanently enjoined from conducting, or causing to be conducted, a representation election of all porters, janitors and maids working at The Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, pursuant to the Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12–RC–1209, issued May 3, 1962, wherein the Greyhound Corporation (Southern Greyhound Lines Division) and Floors, Inc., of Florida, are alleged to be the employer, and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL–CIO is alleged to be the petitioner.

2. That defendant's Motion to Dismiss be, and the same is hereby, denied.

3. That defendant's Motion for Summary Judgment be, and the same is hereby, denied.

4. That the defendant was not wrongfully restrained by the Temporary Restraining Order heretofore issued in this case and, therefore, that the bond given by the plaintiff as security required by Rule 65 of the Federal Rules of Civil Procedure may be dissolved and no other or further security need be given by the plaintiff in this cause.

DONE and ORDERED at Tampa, Florida, this 11th day of June, 1962.

/s/ JOSEPH P. LIEB,
United States District Judge.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19755

D. C. Docket No. 4414-Civ-T

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, APPELLANT

versus

THE GREYHOUND CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before JONES and BELL, *Circuit Judges*, and CARSWELL, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued: November 21, 1962.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper,

and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of

the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

U.S. GOVERNMENT PRINTING OFFICE: 1935